Supreme Court, U.S.
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No. 80-206

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DELORES TEAGUE,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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CITY OF ST. LOUIS, MISSOURI.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in failing to consider Petitioner's prayer for relief under 42 U.S.C. § 1981 and 1983, and the Thirteenth and Four-

teenth Amendments to the United States Constitution, despite (a) the abrogation of sovereign immunity in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), which provides Petitioner a cause of action against the City of St. Louis under 42 U.S.C. § 1983, and (b) the fact that a municipality may no longer assert the good faith of its officers as a defense under 42 U.S.C. § 1983. Owen v. City of Independence, Missouri, ____U.S.____, 63 L.Ed.2d 673, 100 S.Ct._____(1980).

2. Whether the Court of Appeals erred in not finding discrimination and retaliation prohibited by Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e et seq.] committed by the City of St. Louis against Petitioner, despite the prima facie case of sex and race discrimination established by Petitioner.

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OPINIONS BELOW

The opinion below is reported at 615 F.2d 773 (1980). It is appended hereto as Appendix A; the trial court, Appendix B.

JURISDICTION

The judgment sought to be reviewed was made and entered on February 28, 1980, by the United States Court of Appeals for the Eighth Circuit. On March 2, 1980, said court denied Petitioner's motion for rehearing or rehearing en banc. On June 12, 1980, Mr. Justice Blackmun of this Court granted an estension ot time for filing this petition for writ of certiorari to and including July 19, 1980. The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIII, United States Constitution; Amendment XIV, United States Constitution.

STATEMENT OF THE CASE

Delores Teague is a black woman who was employed from December, 1971, to August, 1974, by Appellee City of St. Louis, a municipal corporation of the State of Missouri (hereinafter "City"), as a Sanitarian I in the Department of Health and Hospitals. Her assigned duties consisted of block by block, house by house, inspections for exterior sanitation violations, such as unlawful storage of refuse in yards, defective refuse containers, noxious weeds, breeding sites for mosquitos and rat infestations.

During her tenure with the City, she was paid with federal funds. She was ill on a number of occasions and was forced to take sick leave from her job, but when she was terminated, she had accumulated 17 hours of unused sick leave. Despite her illnesses, 33 hours was the greatest amount of sick leave "borrowed" by Mrs. Teague, i.e., unearned sick leave she used, and her attendance was rated "average/adequate" on her December 22, 1973, rating. Further, the City's Civil Service Rating Manual called for three ratings of "inadequate" before dismissal.

Contrary to a finding of fact by the District Court, which was cited with apparent approval by the Court of Appeals, Mrs. Teague never "refused" to work alone or in dangerous areas, but rather complained to her superiors about having to work under such conditions. For example, at Pages 449-450 of the Transcript on

Appeal, the following appears:

> Q. [By Mr. Anderson] But did you go ahead and work on the 25th?
>
> A. [By Mrs. Teague] Yes, I did, because I went to Doctor Bruce [the City department head] that day, complaining to her. I went to her twice, twice the same day.
>
> * * *
>
> Q. So what did you do then?
>
> A. I just went - I came back to the office that morning and went back out, I went in the field and worked.

On June 15, 1974, Mrs. Teague was suspended for three days for allegedly having failed "to stay within her assigned area and follow her assigned work schedule." On June 18, 1974, she filed a discrimination charge against the City with the Equal Employment Opportunity Commission (hereinafter "EEOC"). Notice of that charge was received by the City on or after June 21, 1974. On August 9, 1974, she was arbitrarily discharged from

her job. Thereafter, she filed timely discrimination complaints with EEOC and the Missouri Commission on Human Rights, which respectively found "reasonable cause" and "probable cause" to exist as to her allegations.

Conciliation efforts failed, and all procedural requirements for suit under Title VII were met. On May 31, 1977, she filed suit against the City alleging violations of her rights under the Thirteenth and Fourteenth Amendments to the United States Constitution, Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e et seq.], and 42 U.S.C. §§ 1981 and 1983.

Without considering her allegations under 42 U.S.C. §1983, the District Court rendered a decision in favor of the City, from which an appeal was taken to the United States Court of Appeals for the

Eighth Circuit, having jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. The Court of Appeals affirmed the decision of the District Court, stating that "[t]his Court will not remand the case for the § 1983 claim if there is no purpose in so doing." 615 F.2d. at 776.

POINT I

The abrogation of sovereign immunity in MONELL v. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978), provides Petitioner with a cause of action against the City under 42 U.S.C. § 1983. Because the courts below failed to properly consider Petitioner's prayer for relief under 42 U.S.C. § 1983 in light of MONELL and OWEN v. CITY OF INDEPENDENCE MISSOURI, --U.S.-- (1980), certiorari should be granted in this case.

Over the objection of Mrs. Teague's

counsel, reiterated in her motion for a new trial, the trial court insisted upon applying Monroe v. Pape, 365 U.S. 167 (1961), to her claim under 42 U.S.C. § 1983. Monroe held that a local government is not a "person" for purposes of 42 U.S.C. § 1983.

After the trial of this case and pending appeal, this Court decided Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), which overruled Monroe by holding that local governments can be "persons" under 42 U.S.C. § 1983 and consequently can be liable for wrongs thereby prohibited. By retroactive application, this confirms Mrs. Teague's cause of action under 42 U.S.C. § 1983.

In her original complaint, she alleged that by firing her the City had denied her legally protected rights under 42 U.S.C. § 1983 and the Thirteenth and

Fourteenth Amendments as well as Title VII of the Civil Rights Act of 1964. The basis of her § 1983 claim was the procedure utilized by the St. Louis Department of Health and Hospitals to dismiss her from her job. That procedure turned on a "policy or custom" of denying her due process, which resulted in her arbitrary and capricious termination. The City's Civil Service Commission did not follow the City's own "Civil Service Rating Manual", by which three "inadequate" ratings are required prior to dismissal. This "policy or custom" of not following its own written procedure is both arbitrary and capricious in Mrs. Teague's case. By violation of its own criteria, the action of the City of St. Louis Department of Health and Hospitals and Civil Service Commission should be deemed void and violative of both 42 U.S.C. § 1983 and the procedural due process

clause of the Fourteenth Amendment to the United States Constitution. See, Dennis v. S & S Consolidated Rural High School District, 577 F.2d. 338 (5th Cir. 1978); Adickes v. S.H. Kress & Co., 252 F.Supp. 140 (S.D.N.Y. 1970), affirmed, 409 F.2d 121, reversed on other grounds, 398 U.S. 144.

It has been long recognized that procedural due process under the Fourteenth Amendment protects property interests well beyond actual ownership of real estate, chattels or money. See, e.g., Connell v. Higginbothom, 403 U.S. 207, 208 (1971). In delineating the scope of what constitutes a "property" interest, this Court concluded in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> . . .To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is

> a purpose of this ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Such property rights protected under the Fourteenth Amendment are determined outside the Constitution and in such sources as state law. Board of Regents v. Roth, supra; Bishop v. Wood, 426 U.S. 341 (1976).

Mrs. Teague's situation should be distinguished, however, from Board of Regents v. Roth, supra, in which the Court held that Roth was not deprived of a "property" interest because the terms of his teaching appointment was to terminate at the end of the academic year.

As the foregoing may be applied to Mrs. Teague, she had a property interest in her

continued employment, because she had a legitimate claim and expectation to remain employed at least until the third service rating, and to be terminated then only if the third rating was "inadequate". Her expectations were based on the City's own Civil Service Rating Manual.

Similarly, in Goldberg v. Kelly, 397 U.S. 254 (1970), this Court held that persons receiving welfare benefits under statutory and administrative standards defining their eligibility have a property interest in continued receipt of those benefits which is safeguarded by the due process clause of the Fourteenth Amendment.

The Court of Appeals did not consider Mrs. Teague's rights under 42 U.S.C. § 1983, perhaps because they were convinced of the "rightness" of their own decision in Owen v. City of Independence, Missouri, 589 F.2d 335 (8th Cir. 1978),

which this Court reversed and remanded, or perhaps because of what the appellate Court felt was evidence rebutting Petitioner's prima facie Title VII case, though the trial court made no finding either way on retaliation. Either rationale leaves Mrs. Teague without her "day in court" under 42 U.S.C. § 1983. Moreover, it is clear from the record that Mrs. Teague made an election when she chose to come to the federal court rather than file an appeal from the Civil Service Commission ruling in state court. The Transcript on Appeal indicates at Pages 241-242:

> [Mr. Anderson] Yes, I believe she in essence elected a remedy, though, when she chose--from a practical point of view, when she chose this instead.
>
> [The Court] I understand. I'm not adding additional weight because of it. You mean she elected her remedy by coming here?
>
> [Mr. Anderson] By coming here.

In addition, the City informed the Court of Appeals in oral arguemnt that in event of a reversal, it would rely on the "good faith" defense allowed by that Court in its opinion in Owen , supra, now reversed.

Therefore, we believe that this Court should consider this substantial and fundamental question.

POINT II

Petitioner established a prima facie case of sex and race discrimination and demonstrated with substantial evidence that a Title VII violation had occurred. The sufficiency of the evidence to rebut Petitioner's prima facie case is in dispute.

The trial judge found that Mrs. Teague had "refused" to work alone at least twice and had, on one occasion, refused to work in the field, claiming it was too

dangerous for a woman to work without a car. These findings are reiterated in the Court of Appeals decision, but they lack a basis in fact in the transcript. Moreover, the trial judge found that Mrs. Teague had been out of her assigned area on "at least four occasions" and that she had been docked several times for unexcused absences. The record, however, contained evidence to the contrary as to the former and medical explanations as to the latter.

During this period of time, other employees of the City's Department of Health and Hospitals (predominantly white and male) were reprimanded for numerous violations of work rules, but dealt with less harshly than she. Therefore, the conclusion of the Court of Appeals at 615 F.2d at 777 that "[b]ased on these findings defendant [City] clearly was

justified in firing her" has no basis in fact.

Moreover, the Court of Appeals and the trial court overlooked the third part of the Title VII paradigm found in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973), i.e., the plaintiff "must be afforded a fair opportunity to demonstrate that [defendant's] assigned reason for [its action] was a pretext or discriminatory in its application." The Court of Appeals stated that "[w]e cannot say that his [the trial judge's] findings here are erroneous." 615 F.2d at 775. Such language ignores the established criteria for the review of ultimate facts, i.e., a finding of non-discrimination is a finding of ultimate fact that can be reversed free of the "clearly erroneous rule" contained in Fed. R. Civ. P. 52(a). See, e.g., Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374

(5th Cir. 1978).

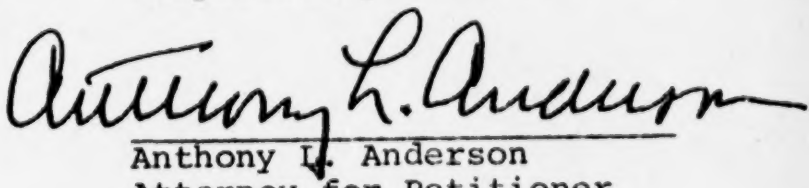
We believe that this Court should again consider this substantial and fundamental question of burden of proof, together with the question following from it as to the ultimate fact.

CONCLUSION

This Court should grant certiorari, and the judgement below should be reversed.

DATED this 19th day of July, 1980, at St. Louis, Missouri.

Respectfully submitted



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APPENDIX "A"

Delores TEAGUE, Appellant,

v.

CITY OF ST. LOUIS, Missouri, Appellee.

No. 78-1648.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 14, 1980.

Decided Feb. 28, 1980.

Rehearing and Rehearing En Banc
Denied March 21, 1980.

Black, female employee brought employment discrimination suit against her employer after her employment was terminated. The United States District Court for the Eastern District of Missouri, Edward L. Filippine, J., did not find a violation of Title VII of the Civil Rights Act of 1964 and did not consider employee's claim brought under statute authorizing civil suit for deprivation of civil rights, and employee appealed. The Court of Appeals, Henley, Circuit Judge, held that: (1) evidence supported trial court's findings that employer rebutted employee's prima facie case of discrimination; (2) trial court did not err in concluding that employee failed to establish either unequal treatment or that employer's justifications were pretextual; and (3) employer's alleged failure to follow its usual procedures with regard to employee's dismissal would not form basis of civil action for deprivation of civil rights where evidence indicated that employer was clearly justified in firing employee.

Affirmed.

1. Civil Rights ⇐44(1)

In a proceeding under Title VII of the Civil Rights Act of 1964, a plaintiff must

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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APPENDIX "A"

[Report appearing at 615 F.2d, 773 (1980)
8th Circuit]

Delores TEAGUE, Appellant,

v.

CITY OF ST. LOUIS, MISSOURI, Appellee.

No. 78-1648.

United States Court of Appeals
Eighth Circuit

Submitted Jan. 14, 1980.

Decided Feb. 28, 1980.

Rehearing and Rehearing En Banc
Denied March 21, 1980.

* * * *

[615 F.2d. at 773]

Before ROSS and HENLEY, Circuit Judges, and PORTER, District Judge.*

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* The Honorable Donald J. Porter, United States District Judge for the District of South Dakota, sitting by designation.

HENLEY, Circuit Judge.

Plaintiff a black woman, was employed by the St. Louis Department of Health and Hospitals from December, 1971 to August, 1974 as a "Sanitarian I". This position involved block by block, house by house inspections for sanitation violations such as rat infestations or faulty trash containers. Plaintiff was fired, and the City's Civil Service Commission approved her dismissal. A white male was hired to take her place. Plaintiff claims that defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976) by discrimination against her on account of her race and/or sex. She further claims that her dismissal was arbitrary, without due process, and in violation of 42 U.S.C. § 1983(1976). She asserts that the district court erred in not considering her § 1983 claim. We disagree and affirm the decision.

The district court found that the plaintiff had established a prima facie case of discrimination, but that the defendant rebutted her case by showing adequate reasons for the dismissal. That court further found that the plaintiff was not treated any differently from others, and that she had failed to establish that defendant's reasons for her dismissal were pretextual in nature.

The district court did not consider plaintiff's § 1983 claim because at the time of its decision the liability of a municipal defendant under § 1983 was governed by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed 492 (1961). That

case held that cities were not "persons"[1] for purposes of § 1983 and hence not subject to liability under that statute. 364 U.S. at 191-92, 81 S.Ct. at 486-87. Two months later after the district court made its decision in this case, the Supreme Court overruled Monroe to the extent that it held that cities were not subject to liability under § 1983; that they are so subject was established by Monell v. New York City Department of Social Services, 436 U.S. 658, 663, 98 S.Ct. 2018, 2021-2022, 56 L.Ed.2d 611 (1978). Plaintiff moved for a new trial, but her motion was denied.

Defendant's announced reasons for firing the Plaintiff were absenteeism, poor service ratings, and unwillingness and/or inability to perform work. Plaintiff responded that at the time of her dismissal she had accumulated seventeen hours of unused sick leave, and that her attendance was rated "average/adequate" in December, 1973. Further, the City's Civil Service Manual called for three ratings of "inadequate" before dismissal, and she had received only two. Finally, plaintiff says that while it was the

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[1] 42 U.S.C. § 1983 (1976) provides:
Every person who under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitiution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

defendant's official policy that sanitation inspectors should work alone and on foot, white males were allowed to violate this policy with impunuty, but she was not.

Any Title VII case has three stages. In the first stage, a plaintiff must establish a prima facie case of discrimination. The prima facie case here is that plaintiff is a black woman, she was fired and a white man was hired to take her place. The second stageof a Title VII action, the defendant must rebut plaintiff's prima facie case by articulating some nondiscriminatory reasons for its actions. McDonnell Douglas Corp. v. Green, 411 U.S. 792,802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The defendant need not prove absence of discriminatory motive; it only needs to articulate nondiscriminatory justifications for its actions. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24,25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). At the third stage of Title VII litigation, the plaintiff "must be afforded a fair opportunity to demonstrate that [defendant's] assigned reason for [its action] was a pretext or discriminatory in its application." McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 807, 93 S.Ct. at 1826-27.

Plaintiff argues that defendant failed to produce enough evidence to rebut her prima facie case. She asserts there was insufficient evidence to establish her absences, her refusals to work alone, and a refusal to work in the field. There was, however, evidence in the record to support the trial judge's conclusion that these events occurred. We cannot say that his findings here are clearly erroneous.

Plaintiff also asserts that even if defendant rebutted her case, its justifications were a pretext or discriminatory in application. Specifically, she claims the district court erred in failing to find that (1) white males were allowed to violate defendant's policy that inspectors should work alone and on foot. (2) plaintiff's discharge was in part retaliation for an earlier complaint she made against defendant to the EEOC, and (3) defendant's supervisor used the Civil Service Rating Manual to evaluate plaintiff's performance in a discriminatory manner. The district judge specifically found that defendant's policies regarding pairing of inspectors and the use of cars were not applied unequally and there was evidence in the record to support this finding. The trial judge made no specific findings as to (2) and (3) but he did dispose of them indirectly. By concluding that plaintiff failed to establish defendant's justification for dismissal were pretextual, he rejected her retaliation claim. Since he found plaintiff did not properly perform her duties, he implicitly rejected her claim of discriminatory evaluations. We find no error in the trial judge's conclusions that plaintiff failed to establish either unequal treatment or that defendant's justifications were pretextual.

Plaintiff' § 1983 argument[2] rests on

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[2] Defendant argues that Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), should not be applied retroactively to this case, However, we applied Monell retroactively

defendant's alleged failure to follow its usual procedures with regard to her dismissal. According to the defendant's Civil Service Rating Manual, employees should be rated every twenty-six weeks. There is also a provision whereby the appointing authority (in this case the Department of Health and Hospitals) may request a sixty day rating. If an employee receives three "inadequate" ratings, he must be dismissed. Plaintiff received only two "inadequate" ratings, and she had thirteen weeks to go until her next rating. No sixty day rating was requested.

Plaintiff asserts that she had a property interest in her continued employment at least until the third service rating, and then be terminated only if she was again rated as "inadequate." She analogizes her interest to that of the welfare recipients in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In that case the Supreme Court recognized that welfare recipients have a property interest in continued benefits, because the payments "are a matter of statutory entitlement for persons qualified to receive them." Id at 262, 90 S.Ct. at 1017. In this case plaintiff argues she was entitled to rely upon

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in Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978), cert. granted, ____ U.S. ____ 100 S.Ct. 42, 62 L.Ed.2d 28 (1979). Owen has been argued before the Supreme Court, but not yet decided. We will proceed upon the assumption that Monell should at least apply to cases pending at the time it was decided.

the procedures set up in the Civil Service Manual. Further, she says that defendant's failure to follow its usual procedures deprived her of her property interest in her job arbitrarily, and without procedural due process, giving rise to a cause of action under § 1983.

We will assume but not decide that a public employee who satisfactorily performed his duties would have a property right to continued employment under the evaluation of the defendant.[3] The question remains whether, given the facts found by the district court, there is any possibility that plaintiff could prevail on her § 1983 claim. This court will not remand the case for the § 1983 claim if there is no purpose in doing so.[4]

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[3] Defendant argues that its manual calls for mandatory dismissal if an employee receives three inadequate ratings. Defendant asserts that this rule does not say that before an employee may be dismissed, he must receive three "inadequate" ratings. There can, in other words, be other occasions which would call for dismissal. Under defendant's interpretation, there would be no property right to positions such as plaintiff had.

[4] Tyler v. Woodson, 597 F.2d 643 (8th Cir. 1979). In that case the plaintiff had not alleged that the injury inflicted upon him by an employee of the defendant municipality was pursuant to any official policy of the defendant. Under Monell v. New York City Department of Social Services, supra, 436 U.S. at 691-93, 96 S.Ct. at 2036-37, isolated acts by public officials are not enough to subject a municipality to § 1983

In this case the findings of fact of the trial judge preclude the possibility that he would find plaintiff's dismissal was arbitrary and capricious. Specifically, he found that plaintiff could not be found in her assigned area on at least four occasions, and that she was docked several times for unexcused absence. He found she refused to work alone at least twice, even though it was defendant's policy that exterior inspectors should work alone. In addition, on one occasion she refused to work in the field, claiming it was too dangerous for a woman to work without a car. Based on these findings, defendant clearly was justified in firing her. No matter what its usual procedures, where, defendant is not required to keep employees who skip work and refuse to perform the normal duties of the job.

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liability; the acts must be pursuant to some municipal policy. Thus, in Tyler there would have been no purpose in remanding the case against the municipality, even though the acts complained of arguably violated the constitutional rights of the plaintiff.

Plaintiff does not assert that the written procedure of three "inadequate" ratings before dismissal is an unconstitutional policy nor does she claim reversal for any lack of administrative hearing. Instead she complains that defendant failed to follow its written procedure. She views the entire procedure--the dismissal by the St. Louis Department of Health and Hospitals, and the approval by the City's Civil Service Commission

This is especially true in a job such as this one, where employees evidently remain unsupervised most of the time.

Since we find the district judge correctly decided the Title VII claim, and since we can find no purpose for a remand under § 1983, the judgment of the district court is affirmed.

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as evidence of an unconstitutional policy of arbitrary dismissals. Plaintiff's reasoning is circular--since she was fired arbitrarily, there must be a policy of arbitrary dismissals, and therefore defendant's act of dismissal comes within § 1983. The problem here is an attempt to distinguish policy and conduct. In Owen v. City of Independence, supra, the Supreme Court may consider the question of policy/conduct distinctions, and the scope of local government immunity under § 1983. We, therefore, will base our decision on the question of whether, given the findings of the trial court, the defendant's actions were arbitrary.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DELORES TEAGUE, Plaintiff,	)	No. 77-575 C (4)
v.	)	MEMORANDUM OPINION FILED MAY 28, 1978
CITY OF ST. LOUIS, MISSOURI, Defendant.	)	

This matter is before the Court for a decision on the merits following trial to the Court on alleged violations of Title VII, 42 U.S.C. §2000e et seq., 42 U.S.C. §1981, and 42 U.S.C. §1983. After consideration of the matter, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, Delores Teague, is a black citizen of the United States residing in the City of St. Louis, Missouri.

2. Defendant, City of St. Louis, is a municipal corporation duly organized and existing under the laws of the State of Missouri.

3. Plaintiff was employed as a Sanitarian I in the City of St. Louis Department of Health and Hospitals from December, 1971, to August 9, 1974.

4. The duties of a Sanitarian I included block by block, house by house inspection for exterior sanitation violations such as unlawful refuse storage, noxious weeds, rat infestation, and mosquito breeding sites. Such inspections require close examination and physical entry on the premises.

5. On March 25 and March 26, 1974, plaintiff failed to follow her assigned work schedule and left her assigned work area before 11 a.m. She did not return to the office or contact the office by telephone.

6. On June 12, 1974, plaintiff again could not be found in her work area.

7. Plaintiff was suspended for a three-day period, suffering a loss of one day's pay, on June 18, 1974, for failing to follow her assigned work schedule.

8. On June 26, 1974, plaintiff refused to work in her assigned area unless accompanied by another inspector, and on July 2, 1974, plaintiff refused to work in the field, claiming it was too dangerous for a woman to work that area without a car.

9. Plaintiff had previously requested a transfer in April, 1973, from her assigned work area of Chouteau Park because it was too dangerous. The request was granted and plaintiff was assigned to Compton Heights.

10. In the early part of August, 1974, plaintiff refused to make inspections alone, claiming it was too dangerous.

11. On August 8, 1974, a field check made between 2:15 and 4:15 p.m. revealed that plaintiff was outside her assigned work area for more than two hours.

12. Plaintiff was discharged on August 9, 1974.

13. Defendant, City of St. Louis, has a sick leave policy which allows the accrual of five hours of sick leave for each two-

week pay period.

14. Plaintiff's attendance record through the course of her employment indicates three extended period of sick leave and several isolated incidents of sick days taken. The record also indicates plaintiff was docked several times for unexcused time away from work. Plaintiff, however, at the time of her discharge had accumulated 17 hours of sick leave and six hours of vacation time.

15. It is the policy of defendant to have exterior inspectors work alone and on foot. Sanitarians are paired only for interior inspections. It is also defendant's policy to allow only reinspections to be made from automobiles.

16. Plaintiff filed a charge of discrimination with the EEOC within 180 days of the alleged violation.

17. Plaintiff filed suit within 90 days of receipt of her right to sue letter.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to 42 U.S.C. §2000e et seq.

2. Defendant, City of St. Louis, is an employer within the meaning of 42 U.S.C. § 2000e et seq.

3. Plaintiff established a prima facie case of race and/or sex discrimination, thereby placing the burden of proof on defendant to establish that its firing of plaintiff was not racially or sexually motivated. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

4. Defendant has met the burden of proof and shown that its dismissal of plaintiff was for good cause; specifically, that plaintiff did not properly perform her duties because she failed or refused to work in those areas to which she was assigned, and had a poor attendance record exclusive of the sick leave allowed under the sick leave policy of defendant.

5. Defendant has established that plaintiff was not treated differently from others in essentially similar fact situations in regard to her discharge.

6. Defendant has also shown that work policies regarding the pairing of inspectors and the use of cars during inspection were not applied unequally.

7. Plaintiff has failed to establish the the reasons for her discharge were pretextual in nature. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

8. Defendant, City of St. Louis, shall have judgment against plaintiff, Delores Teague, together with all costs incurred in this action.

Dated this 28th day of March, 1978.

/s/Edward L. Filippine
United States District
Judge

Supreme Court, U. S.
FILED
SEP 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-206

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

DELORES TEAGUE,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED FOR REVIEW OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to Rule 34, Supreme Court Rules, Respondent accepts and adopts herein by reference, those portions of

Petitioner s Petition for Certiorari designated "Questions Presented for Review," "Opinions Below," "Jurisdiction" and "Constitutional Provisions Involved."

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STATEMENT OF THE CASE

Pursuant to Rule 34, Supreme Court Rules, Respondent accepts and adopts herein by reference, Petitioner's Statement of the Case with the following corrections and additions: In her Statement of the Case, at page 7, Petitioner states that she was "arbitrarily discharged from her job." In fact, she was discharged for being a wholly inadequate employee as can be seen from the following transcript references:

--Excessive absenteeism (T. 248-249). From January to June of 1973, plaintiff was docked for a total of 233 hours, and took 39 sick leave hours. From July to December, 1973, she was docked 8 hours and took 48 hours of sick leave. From January to June, 1974, plaintiff was docked 44

hours, took 41 hours sick leave, and had a 146-hour leave of absence. In July and August of 1974, she was docked 13 hours and took 11 hours of sick leave.

On one occasion when plaintiff claimed to be hospitalized, her supervisors, upon telephoning the hospital learned that plaintiff had been discharged at least a week earlier. (T. 237).

--Poor Service Ratings (T. 296-298). For the period from January to June, 1972, plaintiff was given an overall rating of "Inadequate." From June to December, 1972, her overall rating was "Adequate." In December, 1973, for the year preceding, her overall rating was again "Inadequate."

--Failure to stay in her assigned area as directed (T. 374-376, 378). Plaintiff was terminated in early

August, 1974, when she could not be found in her assigned work area where she had been instructed to remain (T. 378). This had also occurred on at least three prior occasions in March, and June of 1974, and plaintiff had received a three-day suspension as a warning and disciplinary measure. (T. 374-376).

--Unwilling and/or inability to perform her duties as required. Although plaintiff's job called for her to make her inspections alone, she refused on a number of occasions to work unless another inspector was assigned to go with her (T. 378-379). Additionally, she complained repeatedly about having to go into the field in inclement weather (T. 211 and 374), and about the areas in which she was assigned to work (T. 367-369). Further,

plaintiff had some difficulty in doing her job correctly, particularly with regard to the paperwork attendant upon her inspections (T. 383-384). Finally, plaintiff demonstrated a disregard for the established procedures for notifying her superiors when she left her assigned area for any reason (T. 391).

In addition to evidence demonstrating plaintiff's inadequacy for her position, defendant also produced evidence to indicate that plaintiff was treated no differently from any other person in her position.

Attorneys for both parties, both on direct and cross-examination, questioned defendant's witnesses with regard to the treatment of other city employees in positions the same or similar to that held by plaintiff.

(T. 223-225, 242-245, 254-257, 268-289, 304-306, 315-318, 319-322, 322-323, 344-345, 394-395). In each case, defendant was able to show that a difference in treatment, if any, was warranted by a difference in circumstances.

Defendant also volunteered statistical breakdowns, by race and sex of its Sanitarian I workforce. (T. 259-261) as follows:

In January, 1972 (shortly after plaintiff commenced her employment), there were a total of 68 Sanitarians I: 10 black females, 21 black males, 1 white female and 36 white males.

In July, 1974 (shortly before plaintiff was terminated), there were a total of 33 Sanitarians I: 9 black females, 11 black males, 13 white males and no white females.

At the end of 1977 (at the time of trial), there were a total of 52 Sanitarians I: 10 black females, 25 black males, no white females and 17 white males.

Plaintiff complained that she was forced to work alone, while male inspectors were permitted to work in pairs. Plaintiff's supervisors testified (T. 263, 347-349) that, while interior inspectors were occasionally assigned in pairs because of the hazards of their jobs, exterior inspectors such as plaintiff were routinely assigned to work alone, regardless of their race or sex.

Plaintiff complained that male exterior inspectors were permitted to make inspections from their vehicles, while she was required to make inspections on foot. Again, plaintiff's supervisors

testified (T. 333-336, 360-361) that all exterior inspectors were required to make initial inspections on foot, and that re-inspections, i.e. checking to see if violations had been abated, might be done in a vehicle where feasible.

ARGUMENT IN OPPOSITION TO CERTIORARI

I.

The Court Should Decline To Grant Certiorari In This Matter Because The Questions For Review Set Forth By Petitioner Do Not Meet The Requirements Of Rule 17, Supreme Court Rules, that There Be "Special and Important" Reasons For Review, Inasmuch As The Factual Situation Herein Will Limit The Applicability Of Any Decision Rendered On Review.

Respondent herein contends that certiorari should not be granted by the Court, inasmuch as neither of the two questions for review presented by Petitioner are of such stature as to fall within the scope of "special and important" as required by Rule 17 of the Supreme Court Rules.

Rule 17 explicitly states that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." The Rule goes on to enumerate some of types of issues which could give rise to the granting of certiorari.

Petitioner, in her Petition for Certiorari, does not claim that any of the reasons enumerated in Rule 17 are applicable to her situation. Nor does she maintain that her situation involves some other characteristic which would render it "special and important" within the meaning of Rule 17.

In Rice v. Sioux City Memorial Parks Cemetery, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955), the Court ob-

served that certiorari "should not be granted except in cases involving principles the settlement of which is important to the public, as distinguished from that of parties."

It would seem obvious that at least Petitioner's Point II -- effectively, that the court's judgment was not supported by the evidence -- would be of no import to anyone but Petitioner, and certainly not to the general public, inasmuch as the factual situation applies solely to Petitioner.

With regard to Petitioner's Point I, Petitioner has stated a question of apparently broader interest: to-wit, Should the Court's decision in Monell v. New York Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) be applied retroactively to actions pending at the time of the Court's

decision? The breadth and importance of the question, however, is illusory. Because of the peculiar factual situation involved, any decision rendered by this Court as to the retroactivity of Monell, supra, would probably not be universally applicable and would not resolve the issue of retroactivity in clear-cut terms.

This is so because the same facts which gave rise to Plaintiff's claim under 42 U.S.C. 1983 also are the basis of Petitioner's claim under 42 U.S.C. 2000e et seq. (hereinafter Title VII). Plaintiff was afforded a complete hearing on her Title VII cause of action and specific findings of fact and conclusions of law were issued by the trial court.

In short, it would serve no useful purpose to remand this matter for hearing pursuant to 42 U.S.C. 1983 for two reasons: 1) If Petitioner was unable to

successfully prosecute an action pursuant to Title VII, it would be virtually impossible, under the same fact situation, for her to make a case under 42 U.S.C. 1983, and 2) Unless the district court were to change its mind, the conclusions of law rendered by the district court with regard to plaintiff's Title VII claim effectively preclude Petitioner's success in an action pursuant to 42 U.S.C. 1983.

Thus, should this Court grant certiorari, any decision resulting therefrom would, of necessity, be limited to the unusual factual situation found in this matter, and not of national import.

There is precedent in both the Eighth and Fifth Circuits for refusing to remand for reconsideration under Monell, supra, when to do so would serve no purpose. Tyler v. Woodson, 597 F.2d 643, 644 (1979); Goff v. San Jacinto Junior

College, 588 F.2d 96 (1979).

CONCLUSION

This Court should deny Petitioner's Petition for Writ of Certiorari and should affirm the judgment below.

DATED this day of , 1980 at St. Louis, Missouri.

Respectfully Submitted,

THOMAS A. CONNELLY
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